NOTES OF CASES.

The Right of Privacy.—The ancient maxim that there is no wrong without a remedy has been often shown to be false, but never more decisively than in a late case in Washington. Hillman *v.* Star Publishing Co., 117 Pac. 594.

A newspaper published an article stating that plaintiff's father had been charged with using the mails to defraud in selling land, and would be arrested, giving the details of the fraudulent operations, and publishing a photograph of the members of the family, including plaintiff, his young daughter. The Supreme Court held, that the publication of plaintiff's photograph in connection with the article concerning her father was not a libel, and that there was no such right of privacy as would sustain an action. The plaintiff had been wronged the court admitted, but it was a wrong which the court could not redress. It is a subject for legislation, and to the legislative body an appeal might be so framed that in the future the names of the innocent and unoffending, as well as their likenesses, shall not be linked with those whose relations to the public have made them and their reputations in a sense the common property of men.

The conclusion of course is founded on Roberson *v.* Rochester Folding Box Co., 171 N. Y. 538, 64 N. E. 442, one of the narrowest, most illogical and unjust decisions which the judicial reports contain and which was very soon reversed by legislation. In this case the majority of the New York Court of Appeals bases its conclusion upon the statement that the case there presented was without precedent, and, while admitting that equity, in the beginning and early part of its administration, was made up of growth, case by case, which was without precedent, being based merely upon the conscience of the chancellor, yet there came a time when its growth ceased, and what was formerly the personal conscience of the chancellor became a "juridical conscience," which would only permit relief to be administered in cases where it had been administered before, save in those instances "where there can be found a clear and unequivocal principle of the common law which either directly or immediately governs it, or which by analogy or parity of reasoning ought to govern it." With such consideration as a guiding thought, the court refused relief, because there was no precedent for it, and it did not appear to be within any recognized legal principle. Ellison, J., in Munden *v.* Harris, 134 S. W. 1076. In Sperry *v.* Rhodes, 31 Sup. Ct. Rep. 490, the United States Supreme Court sustained the constitutionality of the New York statute of 1903, which makes the use of a photograph of a living person for advertising purposes a misdemeanor unless such person consents to such use, thereby sustaining the judgment of the New York Court of Appeals to the

same effect. 193 N. Y. 223, 85 N. S. 1097. The court said: "It is argued that as before the statute a person could not prevent the use of her portrait by one who took and owned it (Roberson *v.* Rochester Folding Box Co., 171 N. Y. 538, 59 L. R. A. 478, 89 Am. St. Rep. 828, 64 N. E. R. 442), to deny that use now is to deprive the owner of his property without due process of law. The court of appeals held that the statute applied only to photographs taken after it went into effect, as was the photograph of the plaintiff that the defendant used. The property was brought into existence under a law that limited the uses to be made of it, and if otherwise there could could have been any question, in such a case there is none. Some comment was made in argument on the distinction between photographs taken before and after the date in 1903, as inconsistent with the 14th Amendment. But the 14th Amendment does not forbid statutes and statutory changes to have a beginning, and thus to discriminate between the rights of an earlier and later time.

In Munden *v.* Harris, 134 S. W. 476, a retail jeweler in Kansas City published as an advertisement in aid of his business the picture of a child five years old, with the statement underneath, "Papa is going to buy mamma an Elgin watch for a present, and some one (I must not tell who) is going to buy my big sister a diamond ring, so don't you think you ought to buy me something?"

The jeweler had no authority to make the statement and none to publish the child's picture. The Missouri Court of Appeals holds that the lower court erred in sustaining a demurrer to the action of the child for damages. "Property," says Ellison, J., "is not necessarily a taxable thing any more than it is always a tangible thing. It may consist of things incorporeal, and things incorporeal may consist of rights common in every man. One is not compelled to show that he used, or intended to use, any right which he has, in order to determine whether it is a valuable right of which he cannot be deprived, and in which the law will protect him. The privilege and capacity to exercise a right, though unexercised, is a thing of value—is property—of which one cannot be despoiled. If a man has a right to his own image as made to appear by his picture, it cannot be appropriated by another against his consent. It must strike the most obtuse that a claim of exclusive right to one's picture is a just claim. One may have peculiarity of appearance, and if it is to be made a matter of merchandise, why should it not be for his benefit? It is a right which he may wish to exercise for his own profit, and why may he not restrain another who is using it for gain? If there is value in it, sufficient to excite the cupidity of another, why is it not the property of him who gives it the value and from whom the value springs?

"It may be admitted that the right of privacy is an intangible right; but so are numerous others which no one would think of denying

to be legal rights, which would be protected by the courts. It is spoken of as a new right, when, in fact, it is an old right with a new name. Life, liberty and the pursuit of happiness are rights of all men. The right to life includes the pursuit of happiness; for it is well said that the right to life includes the right to enjoy life. Every one has the privilege of following that mode of life, if it will not interfere with others, which will bring to him the most contentment and happiness. He may adopt that of privacy, or, if he likes, of entire seclusion. The face of the majority opinion in Roberson *v.* Rochester Folding Box Co., supra, while denominating the right of privacy as 'a phrase' and 'a so-called right,' yet concedes that it is a something which to disturb is an 'impertinence.' The court recognizes the right, but, as has been already said, not considering it a property right, refused it the protection of the restraining power of a court of equity, and thereby confined the beneficent power of equity within too narrow bounds—bounds so limited as will permit the doing of acts which shock the moral sense.

"We therefore conclude that one has an exclusive right to his picture, on the score of its being a property right material profit. We also consider it to be a property right of value, in that it is one of the modes of securing to a person the enjoyment of life and the exercise of liberty, and that novelty of the claim is no objection to relief. If this right is, in either respect, invaded, he may have his remedy, either by restraint in equity or damages in an action at law. If there are special damages, they may be stated and recovered; but such character of damage is not necessary to the action, since general damages may be recovered without a showing of specific loss; and if the element of malice appears, as that term is known to the law, exemplary damages may be recovered.

"It ought, however, to be added that though a picture is property, its owner, of course, may consent to its being used by others. This consent may be express, or it may be shown by acts which would be inconsistent with the claim of exclusive use, as if one should become a man engaged in public affairs, or who, by a course of conduct, has excited public interest. And it ought also to be understood that the right of privacy does not extend so far as to subvert those rights which spring from social conditions, including business relations. By becoming a member of a society one renders those natural rights which are incompatible with social conditions. In the nature of things, man in the social organization must be referred to and spoken of by others, and this may be done freely, so long as it is free from slander. But the difference between that right and a claim to take another's picture against his consent, or to make merchandise of it, or to exhibit it, is too wide for hesitation in condemning the act and granting proper relief. The foregoing views find ample support in thoroughly considered cases decided in recent years."

Pavesich *v.* New Eng. Life Ins. Co., 122 Ga. 190, 50 S. E. 68, 69 L. R. A. 101, 106 Am. St. Rep. 104; Vanderbilt *v.* Mitchell, 71 N. J. Eq. 632, 63 Atl. 1107; Edison *v.* Edison Mfg. Co., 73 N. J. Eq. 136, 67 Atl. 392; Foster-Milburn Co. *v.* Chinn, 134 Ky. 424, 120 S. W. 364; dissenting opinion of Judge Gray in Robertson *v.* Rochester Folding Box Co., supra; Schuyler *v.* Curtis, 147 N. Y. 434, 42 N. E. 22, 31 L. R. A. 286, 49 Am. St. Rep. 671, 4 Harv. Law Rev. 193.—American Law Review.

Note.—See leading article in XII Va. Law Reg. 91.

Duty of Driver of Vehicle Overtaking Vehicle Moving in Same Direction.—In a recent well-considered Nebraska case, Hackett *v.* Alamito Sanitary Dairy Co. (Nov. 14, 1911), it was held that the duty of the driver of a vehicle overtaking another vehicle, to keep to the proper side of the road, was not an absolute one. But that if he does not do so, he must exercise a greater degree of diligence than would be necessary if he were on the proper side of the highway.

Except for the statute in this state with respect to motor vehicles, there has been neither statutory enactment nor adjudication defining the rights of one attempting to pass another driving along a road or street in front of him. An examination of the English cases bearing upon the question whether there is any duty to keep on the proper side of the road, shows that there is no absolute duty but that the whole question is one of negligence. If the accident would not have happened but for the fact that the defendant violated the law of the road, he will be liable. In other words he must exercise greater diligence and keep a better lookout to avoid a collision than would be requisite if he confined himself to the proper side of the road. Pluckwell *v.* Wilson, 5 (Eng.) C. & P. 375; Wayde *v.* Lady Carr, 2 Dow. & Ry. (Eng.) 255.

The decisions of the various courts are somewhat confusing; some of them being based upon statutes, and others are not in harmony with each other. In England, the rule of the road requires persons driving, meeting other vehicles, to keep to the left, and that in passing the foremost bears to the left, while the other passes on his right; while in the United States and upon the Continent of Europe the rule is that persons meeting must keep to the right, and the usual custom is to pass to the left of a vehicle ahead.

In determining the true rule, we will endeavor to discriminate and to confine our examination to cases where accidents have been caused when passing others driving in the same direction.

It may be observed here, before going further that the English courts also hold that the rule as to a carriage being on the proper side of the road does not apply with respect to foot passengers; for, as regards foot passengers, a carriage may go on either side. Cotterell *v.* Starkey, 8 C. & P. (Eng.) 691; Lloyd *v.* Ogleby, 5 C. B. N. S. (Eng.) 667.